

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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DEMETRI ALEXANDER,

Plaintiff,

v.

GARY DUTTON,

Defendant.

Case No. 3:15-cv-00074-MMD-WGC

ORDER ACCEPTING AND ADOPTING  
REPORT AND RECOMMENDATION OF  
MAGISTRATE JUDGE  
WILLIAM G. COBB

**I. SUMMARY**

Before the Court is the Report and Recommendation of United States Magistrate Judge William G. Cobb (ECF No. 31) ("R&R") relating to Defendant's Motion for Summary Judgment ("Motion") (ECF No. 19). The Court has reviewed Plaintiff's objection (ECF No. 32) and Defendant's response (ECF No. 34).<sup>1</sup> For the reasons discussed below, the Court accepts and adopts the R&R in full.

**II. RELEVANT BACKGROUND**

Plaintiff, who is proceeding *pro se*, is an inmate in the custody of the Nevada Department of Corrections ("NDOC"). After screening pursuant to under 28 U.S.C. § 1915A, the Court permitted Plaintiff to proceed on one claim under the Fourth Amendment for the intentional deprivation of property, namely Plaintiff's blue jeans. (ECF No. 14.) Defendant moves for summary judgment, arguing that Plaintiff failed to exhaust his administrative remedies. (ECF No. 19.) The Magistrate Judge agreed with

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<sup>1</sup>Defendant's motion for extension of time to file his response (ECF No. 33) is granted *nunc pro tunc*.

1 Defendant and recommends granting summary judgment. (ECF No. 31.) Plaintiff objects  
2 to the Magistrate Judge's recommendation. (ECF No. 32.)

### 3 **III. LEGAL STANDARDS**

4 This Court "may accept, reject, or modify, in whole or in part, the findings or  
5 recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). Where a party  
6 timely objects to a magistrate judge's report and recommendation, then the court is  
7 required to "make a *de novo* determination of those portions of the [report and  
8 recommendation] to which objection is made." 28 U.S.C. § 636(b)(1). In light of Plaintiffs'  
9 objection, the Court has engaged in a *de novo* review to determine whether to adopt  
10 Magistrate Judge Cobb's recommendation.

11 "The purpose of summary judgment is to avoid unnecessary trials when there is  
12 no dispute as to the facts before the court." *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*,  
13 18 F.3d 1468, 1471 (9th Cir. 1994). Summary judgment is appropriate when "the movant  
14 shows that there is no genuine dispute as to any material fact and the movant is entitled  
15 to a judgment as a matter of law." Fed. R. Civ. P. 56(a); see *Celotex Corp. v. Catrett*,  
16 477 U.S. 317, 322 (1986). In evaluating a summary judgment motion, a court views all  
17 facts and draws all inferences in the light most favorable to the nonmoving party. *Kaiser*  
18 *Cement Corp. v. Fishbach & Moore, Inc.*, 793 F.2d 1100, 1103 (9th Cir. 1986). The  
19 moving party bears the burden of showing that there are no genuine issues of material  
20 fact. *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982).

### 21 **IV. DISCUSSION**

22 Defendant seeks summary judgment under the Prison Litigation Reform Act  
23 ("PLRA"), which provides that "[n]o action shall be brought with respect to prison  
24 conditions under section 1983 . . . by a prisoner confined in any jail, prison, or other  
25 correctional facility until such administrative remedies as are available are  
26 exhausted." 42 U.S.C. § 1997e(a). Defendant argues that NDOC records show Plaintiff  
27 did not file any grievance relating to his claimed intentional deprivation of his jeans. (ECF  
28 No. 19-1 at 2-3.) Plaintiff responds that he was afraid of reprisal or physical harm if he

1 filed a grievance because of Defendant's open display of racism. (ECF No. 28 at 3.) The  
2 Magistrate Judge found that Plaintiff has not shown that his failure to exhaust NDOC's  
3 grievance process was excusable under the test that the Ninth Circuit Court of Appeals  
4 has adopted in *McBride v. Lopez*, 807 F.3d 982 (9th Cir. 2015). (ECF No. 31 at 7-9.)  
5 That test requires the following conditions to be satisfied:

6 In *McBride*, the Ninth Circuit addressed whether a threat of retaliation may be  
7 sufficient to render an administrative remedy "effectively unavailable" to excuse a failure  
8 to exhaust. *McBride*, 807 F.3d at 986-87. The court adopted the Eleventh Circuit's test,  
9 which requires the following conditions be satisfied: "(1) the threat [of retaliation] actually  
10 did deter the plaintiff inmate from lodging a grievance or pursuing a particular part of the  
11 process; and (2) the threat is one that would deter a reasonable inmate of ordinary  
12 firmness and fortitude from lodging a grievance or pursuing the part of the grievance  
13 process that the inmate failed to exhaust." *Id.* at 987 (quoting *Turner v. Burnside*, 541  
14 F.3d 1077, 1085 (11th Cir.2008)).

15 Plaintiff argues that Defendant's use of racial slur — calling Plaintiff the  
16 derogatory "N" word — deterred him from pursuing NDOC's grievance process.<sup>2</sup> (ECF  
17 No. 32 at 1-5.) There is no question that the racial epithet is extremely offensive,  
18 particularly given Plaintiff's race and the historical use of the slur. Even assuming that  
19 Defendant's alleged conduct satisfies the first prong of the *McBride* test, use of the racial  
20 slur alone, without more, would not deter a reasonable inmate from filing a grievance to  
21 satisfy the objective prong of the test. The Court thus agrees with the Magistrate Judge  
22 that Plaintiff's failure to exhaust his administrative remedies is not excusable.

23 In his objection, Plaintiff also argues that his failure to exhaust is excusable  
24 because NDOC's procedural rules, which appear in Administrative Regulation ("AR")  
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26 <sup>2</sup>In *Ross v. Blake*, the Supreme Court found three kinds of circumstances in which  
27 an "administrative remedy, although officially on the books, is not capable of use" by an  
28 inmate to obtain relief. *Ross*, 136 S.Ct. 1850, 1859-60 (2016). Plaintiff's allegation that  
Defendant used racial slur does not fall within the three kinds of circumstances  
addressed in *Ross*.

1 740, do not require him to file a grievance on deprivation of his personal property. (ECF  
2 No. 32 at 8-10.) As Defendant correctly pointed out, Plaintiff's reading of AR 740.03 is  
3 selective. AR 740.03(1) provides that inmates may use the grievance procedure to  
4 resolve claims involving "personal property," which is the claim raised in this case.

5 In sum, the Court agrees with the Magistrate Judge that Plaintiff failed to exhaust  
6 his administrative remedies and summary judgment is the appropriate remedy.

7 **V. CONCLUSION**

8 The Court notes that the parties made several arguments and cited to several  
9 cases not discussed above. The Court has reviewed these arguments and cases and  
10 determines that they do not warrant discussion or reconsideration as they do not affect  
11 the outcome of the Motion and Objection.

12 It is therefore ordered, adjudged and decreed that the Report and  
13 Recommendation of Magistrate Judge William G. Cobb (ECF No. 31) is accepted and  
14 adopted in its entirety. Defendant's Motion for Summary Judgment (ECF No. 19) is  
15 granted.

16 It is further ordered that Defendant's motion for extension of time (ECF No. 33) is  
17 granted *nunc pro tunc*.

18 It is further ordered that Plaintiff's Motion for Contempt of Court (ECF No. 30) is  
19 denied. Plaintiff seeks contempt for Defendant's filing of a response to his objection  
20 when the Magistrate Judge had withdrawn the report and recommendation to which  
21 Plaintiff objects. However, Defendant's filing, while incorrectly docketed as Defendant's  
22 response to Plaintiff's objections, is a reply in support of his motion for summary  
23 judgment. (ECF No. 29.)

24 The Clerk is directed to enter judgment in favor of Defendant and close this case.

25 DATED THIS 17<sup>th</sup> day of March 2017.

26 

27 MIRANDA M. DU  
28 UNITED STATES DISTRICT JUDGE